IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4356 of 1989

For Approval and Signature:

HON'BLE MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MUNICIPAL COMMISSIONER BARODA

Versus

FOR & ON BEHALF OF NARSING SURSING PADHIAR

Appearance:

1. Special Civil Application No. 4356 of 1989

MR PRANAV G DESAI for Petitioner

MR RD RAVAL for Respondent

CORAM : HON'BLE MR.JUSTICE H.K.RATHOD

Date of decision: 24/08/2004

ORAL JUDGEMENT

#. Heard Mr.P.G.Desai, learned advocate for the petitioner and Mr.R.D.Rawal, learned advocate for the

respondent.

#. By way of present petition, the petitioner-Corporation has challenged the award passed by Industrial Tribunal, Vadodara, in Reference (IT) No.124/85 dated 22.2.1989. The Tribunal set aside the reversion order of the respondent and directed the petitioner to appoint the respondent as Accountant in Press Department in the scale of Rs.330-560 as admissible to the said post. The Tribunal further directed to pay arrears of amount within two months by the respondent.

#. Initially, this Court issued Rule and notice as to interim relief. The respondent appeared and filed affidavit in reply. This Court has also passed an interim order dated 8.8.1989 (Coram: S.B.Majmudar & J.U.Mehta, JJ), which reads thus:

"Having heard the learned advocates of both the parties, we have come to the conclusion that there is no question of granting stay of award passed by the Industrial Court pending final hearing of this petition. The Award directs the petitioner Corporation to treat the order of reversion of the workman from the post of Accountant to the post of clerk, as null and void and also directs the Corporation to make good all monetary benefits in the light of the Award. So far as actual reinstatement of the respondent on the post of Accountant is concerned, because the petition is already admitted, we deem it fit to direct that the respondent shall not be permitted to actually work as Accountant. However, all monetary benefits flowing from the award by treating the respondent as Accountant from the date mentioned in the Award should be made available to the respondent and during the pendency of the petition, the respondent shall be paid the salary of Accountant without prejudice to the rights and contentions of the petitioner-Corporation. All the back wages payable to the respondent in the light of the Award shall be paid to the respondent on the respondent furnishing suitable solvent surety to the satisfaction of the Labour Court, Baroda. The amount payable to the respondent pursuant to the Award shall be deposited by the petitioner Corporation in the Labour Court, Baroda within eight weeks from today. Once the amount is deposited, the respondent may withdraw the same on furnishing security as aforesaid. It would be

> open to the respondent to offer the amounts Standing in his Provident Fund account and other retirement benefits which are available to him by way of security and the Labour Court may consider the said amounts also while permitting the respondent to withdraw the deposited amount on security. The petitioner Corporation shall start paying the future salary to the respondent as Accountant with effect from 1.8.1989 onwards regularly."

So this Court has not granted any interim relief staying operation of the award. On the contrary, this Court has directed the Corporation to pay whatever available amounts as per the award passed by the Tribunal except that the respondent-workman should not be appointed on the post of Accountant. This Court has also permitted withdrawal of deposit amount on security.

#. Mr.P.G.Desai, learned counsel for the petitioner, contended that respondent-workman was appointed on probation on the post of Accountant initially for a period of one year by order dated 6.1.1983. Thereafter, his work was not found satisfactory, therefore, his probation period was extended for further period of six months from 11.1.1984. Thereafter, again his probation period was extended from 11.7.1984 to 15.11.1984. Then on 16.11.1984, the respondent-workman was reverted to the post of Junior Clerk. Mr.Desai submitted that before the Tribunal, the Corporation has produced the Resolution passed by the Standing Committee dated 15.3.1980 and Resolution passed by the Corporation's General Board dated 27.3.1980. In the said Resolution, the Corporation has decided that initial appointment, either by way of direct recruitment or in case of promotion from the department, would be for a period of one year. If the work of the person is not found satisfactory, then his further period of probation can be extended. Mr.Desai further submits that these two Resolutions, though produced by the Corporation, were totally ignored by the Tribunal. He also submitted that Circular No.70 dated 3.7.1973 has been wrongly relied upon by the Tribunal. Therefore, it was within the power and domain of the Corporation to extend the period of probation if the work was not found satisfactory but after completion of extended period, the respondent-workman is not deemed to be confirmed and therefore, the Tribunal has committed gross error in setting aside the reversion order passed by the Corporation. In support of these submissions, Mr.Desai relied upon decision of the apex Court in the case of Commissioner of Police, Hubli v. R.S.More

reported in 2003 AIR SCW 478. Mr.Desai submitted that in the said decision the apex Court held that in absence of requisite specific order, employee is not entitled to claim deemed confirmation. He also submitted that mere expiry of probation period does not result in deemed confirmation. In support of this contention, he relied on decision of the apex Court in the case of Mathew P. Thomas v. Kerala State Civil Supply Corporation Limited and others reported in 2003 SCC Labour & Service 262. He submitted further that this decision of the apex Court relates to question, where the services of a probationer are terminated on the basis of unsatisfactory work, whether any procedure is required to be followed by the employer or not. He submitted that the apex Court has held that in such circumstances, if any lapse is committed by an employee, then order of terminating the services for unsatisfactory performance is not stigmatic. Learned advocate Mr.Desai has placed before this Court the reversion order dated 15.11.1984, Circular dated 3.7.1983 and Resolution passed by the Standing Committee as well as the General Board of the Corporation. In the said Resolution, initial appointment is on probation for one year. If the probation period is found satisfactory, then employee should have to be confirmed and if it is not satisfactory and the authority is of the opinion that one extension will improve the conduct of the employee concerned, then probation period is required to be extended accordingly. During extended period of probation, if the conduct is not improved, then service of such employee can be terminated by the Corporation. The Circular dated 3.7.1973 provides that if any employee, either by direct recruitment or promotion, is appointed on probation for a period of one year, then his probation period is required to be extended only for further period of six months. In any circumstances, such probation period cannot be extended for more than total period of eighteen months. Looking to the reversion order dated 15.11.1984, the respondent-employee had worked with effect from 6.1.1983 to 15.11.1984, i.e. for more than eighteen months. The General Board of the Corporation has accepted the proposal of the Standing Committee except items No.3 and 4 by order dated 27.3.1980. In view of the above, Mr.Desai submits, that the award passed by the Tribunal is required to be quashed and set aside. Except this, learned advocate Mr.Desai has not made any other submission or relied upon any authority.

#. Mr.R.D.Rawal, learned counsel for the respondent relied upon the affidavit-in-reply filed by the General Secretary and he supported the award passed by the

Tribunal.

#. I have considered the submissions made by both the learned advocates. There is no dispute between the parties that the respondent-workman was appointed as Accountant in the scale of Rs.330-560 by an order dated 6.1.1983 initially for a period of one year, on probation. The respondent was selected by the selection Committee for the said post. Thereafter, the respondent remained under probation for a period of six more months with effect from 6.1.1984 to 11.7.1984. Thereafter, again, his period of probation was extended from 11.7.1984 to 15.11.1984. So it was extension beyond eighteen months.

#. Before the Tribunal, statement of claim was filed by the Union vide ex.2. The Corporation has filed its written statement vide ex.5. In the said written statement, it is the case of Corporation that the probation period of respondent was extended from time to time because his performance was not satisfactory. However, any dispute has not been raised by the Corporation with regard to the Circular date 3.7.1973 which provides that the probation period of any employee should not be for more than eighteen months. It is further the case of Corporation in the reply that when the performance of the employee concerned was not found satisfactory, he was reverted back to his original post, and there was no question of terminating him and as such, there was no need to issue any show cause notice. According to the Corporation, there were many complaints and allegations were made against the respondent during his probation and therefore, the respondent was not confirmed after completion of probation period. It is necessary to note one important aspect at this stage that before this Court, the learned advocate for the Corporation has relied upon the Resolution passed by the Standing Committee and General Board but in written statement, no averments to that effect were made by the Corporation. Not only that, one officer Mr.Dana represented the Corporation before the Tribunal and made submission only to the extent that the work of respondent was not found satisfactory and therefore his probation period was extended and even thereafter there was no improvement in the conduct of the respondent and therefore, instead of terminating his services, he was reverted back to original post. On behalf of the Union, the concerned employee, i.e. the respondent, was examined vide ex.8 and on behalf of the Corporation, one Mr.Shah was examined vide ex.40. Though certain documents were produced by the Corporation before the

Tribunal, the important fact is that on relying on certain documents, no submissions were made by Mr.Dana on behalf of the Corporation. The point which is not raised before the Tribunal, naturally the Tribunal should not have examined the same or adjudicated the same. The finding are given by the Tribunal in paragraph-6, and the Tribunal has relied upon the Circular dated 3.7.73 which was not disputed by the Corporation in written statement and ultimately, the Tribunal came to the conclusion that considering the undisputed total period of probation, which is beyond one and half years, the Corporation, at the most is entitled to continue the employee upto one and half years on probation only and not more than that. So if any employee remains under probation for more than 18 months, then he is deemed to be confirmed. That aspect has been considered by the Tribunal. The Tribunal has observed that after one and half years' period, if any employee remains under probation, then he is considered to be deemed confirmed employee because the Corporation has no power to extend further period of probation for more than eighteen months because as per the Circular dated 3.7.1973, the Corporation has no power to extend period of probation for more than eighteen months. The Tribunal has also observed that such reversion is contrary to the Circular dated 3.7.1973 and therefore the order of reversion is bad and set aside. The Tribunal has also come to the conclusion that after completion of one and half years' period as probationer, the respondent-employee became a confirmed employee and therefore, he is entitled to continue as confirmed employee on the post of Accountant with effect from 11.7.1984. Accordingly, the Tribunal has granted consequential benefits to the respondent-employee.

#. I have perused the entire award passed by the Tribunal. I have also considered the reasons given by the Tribunal. Mr.Desai relies upon the Resolution of the Standing Committee as well as General Board and points out that the Corporation is entitled to appoint any employee on probation for a period of one year. If his work is found satisfactory, then he is entitled for confirmation by positive order of the Corporation. If his work is not found satisfactory, and authority feels that during extended period he will improve, then Corporation can extend the period of probation and after extended period, if the work is not found satisfactory, then Corporation can terminate the services of such employee. Items 1, 2, and 5 have been accepted by the General Board and No.2 and 4 have been rejected by the General Board. Therefore, even bare reading of such Resolution, items 1 and 2, does not specifically make it

clear whether maximum period is of one and half years or two years, but one extension is mentioned and not two extensions to the employee concerned, meaning thereby, Corporation is entitled to appoint an employee on probation for a maximum period of one year and one extension thereafter and not beyond that. When maximum period of probation is specified or fixed by the Corporation beyond that extension, there is no need to have specific or positive orders from the Corporation about deemed confirmation. Here, in the facts of this case, the maximum period is one and half years. It is not the case of the Corporation before the Tribunal that Circular dated 3.7.1973 has been cancelled by the Corporation in pursuance to the Resolution passed by the General Board. On the contrary, in written statement ex.5, averments are made to the effect that it is admitted by the Corporation that there is Circular dated 3.7.1973 which gives maximum powers to the Corporation to continue an employee on probation for a period of 18 months and not beyond that. Therefore, according to my opinion, the Tribunal has rightly relied upon the circular and passed the award in favour of the respondent-employee. Once the respondent-employee cleared the period of probation of one and half years, further extension was without authority and therefore with effect from 11.7.1984, the respondent-employee is deemed to be confirmed on the post of Accountant. Similar view has been taken by the Division Bench of this Court in the case of Yamini J.Dave v. The Director, IUCAA and anr. reported in 2004(2) GLH 1. Recently, even the apex Court has considered the very question in the case of Mir Mohammad Khasim v. Union of India and others reported in 2004 AIR SCW 3108. The apex Court has considered the case of Commissioner of Police, Hubli v. R.S.More (supra) which has been relied on by Mr.Desai. The apex Court has observed that if rules do not prescribe any maximum period of probation beyond which it cannot be extended, then in such circumstances, after completion of such maximum period, the employee concerned is deemed to be confirmed in service. The apex Court has observed in paragraph 11 in the case of Mir Mohammad Khasim v. Union of India and others (supra) as under:

> "...We feel that on this point a Constitution Bench decision of this Court in State of Punjab v. Dharam Singh, 1968(3) SCR 1, providing that if an employee is continued after maximum period of probation which under the rules cannot be extended any further the employee shall be deemed to have been confirmed, continues to hold the field..."

The Division Bench of this Court has also considered the very aspect in Yamini J.Dave v. The Director, IUCAA and anr. (supra).

#. The Apex Court has considered said aspect in case of High Court of M.P. through Registrar and others v. Satya Narayan Jahavar, reported in [201] 7 SCC 161, more particularly to paragraph 11 of the judgment, which reads as under ;

"The question of deemed confirmation in service jurisprudence, which is dependent upon the language of the relevant service rules, has been the subject matter of consideration before this Court, times without number in various decisions and there are three lines of cases on this point. One line of cases is where in service rules or in the letter of appointment a period of probation is specified and power to extend the same is also conferred upon the authority without prescribing any maximum period of probation and if the officer is continued beyond the prescribed or extended period, he cannot be deemed to be confirmed. In such cases there is no bar against termination at any point of time after expiry of the period of probation. The other line of cases is that where while there is a provision in the rules for initial probation and extension thereof, a maximum period for such extension is also provided beyond which it is not permissible to extend probation. The inference in such cases is that the officer concerned is deemed to have been confirmed upon expiry of the maximum period of probation in case before its expiry the order of termination has not been passed. The last line of cases is where, though under the rules maximum period of probation is prescribed, but the same requires a specific act on the part of the employer by issuing an order of confirmation and of passing a test for the purposes of confirmation. In such cases, even if the maximum period of probation has expired and neither any order of confirmation has been passed nor has the person concerned passed the requisite test, he cannot be deemed to have been confirmed merely because the said period has expired."

The Division Bench in case of Yamini J. Dave [Supra] has also in detail considered the very question in para-14, which is quoted as under :

"14. The Hon'ble Supreme Court had an occasion to examine the issue that after completion of probation period, whether it amounts to an automatic confirmation or it requires positive decision from employer, in Wasim Beg v. State of U.P. and others [(1998) 3 SCC 321]. The Apex Court has observed that such situation would depend upon the provisions in the relevant service rules relating to probation and confirmation. Where the Rules provide for a maximum period of probation beyond which probation cannot be extended, then at the end of the maximum probation period there will be a deemed confirmation of the employee unless the rules provide to the contrary. However, even when the rules prescribe a maximum period of probation, if there is a further provision in the rules for continuation of such probation beyond the maximum period, the Courts have made an exception and said that there will be no deemed confirmation in such cases and the probation period will be deemed to be extended. There may be cases where there is no maximum period prescribed for probation and either there is a Rule providing for extension of probation or there is a Rule which requires a specific act on the part of the employer [either by issuing an order of confirmation or any similar act] which would result in confirmation of the employee. In these cases unless there is an orer of confirmation, the period of probation would continue and there would be no deemed confirmation at the end of the prescribed probationary period. Considering the above decision of the Apex Court and looking to the facts of the present appeal, the Service Rules provide for maximum period of probation for a period of two years, initially for one year, which can be extended for a further period of one year. The probation period has been closed after completion of one year service of the appellant by the respondent. Non extension of further period of one year, means, the appellant is deemed to be confirmed employee because the Rules do not provide to the contrary. There is no provision in service rules of IUCAA which provides otherwise. The relevant observations in Wasim Beg [supra] made by the Apex Court relying upon the earlier decision in identical case in para-15 are quoted as under :

"15. Where an employee at the end of the probationary period automatically gets confirmation in the post or whether an order of confirmation or any specific act on the part of the employer confirming the employee is necessary, will depend upon the provisions in the relevant Service Rules relating to probation and confirmation. There are broadly two sets of authorities of this Court dealing with this question. In those cases, where the Rules provide for a maximum period of probation beyond which probation cannot be extended, this Court has held that at the end of the maximum probationary period there will be a deemed confirmation of the employee unless Rules provide to the contrary. This is the line of cases starting with State of Punjab v. Dharma Singh, M.K. Agarawal v. Gurgaon Gramin Bank, Om Prakash Maurya v. U.P. Coop Sugar Factories Federation, State of Gujarat v. Akhilesh C. Bhargav."

#. Therefore, in view of the above two decisions of the apex Court and of the Division Bench of this Court, and considering the question involved in the present petition and in the light of circular dated 3.7.1973, maximum period of probation fixed is of 18 months and not beyond that. It is undisputed fact that respondent-employee remained under probation for more than 18 months. Therefore, after the period of eighteen months, he is deemed to be confirmed on the post of Accountant with effect from 11.7.1984. Therefore, the decisions relied upon by Mr.Desai are of no help to him in view of the ratio laid down in two decisions referred above. Therefore, the contention which has been raised by Mr.Desai is not acceptable and the same is rejected.

##. The reversion order as admitted by the petitioner corporation was passed because of unsatisfactory work of respondent. Before passing reversion order, no opportunity was given to the respondent and as such, no inquiry was held. Therefore, on this count also, the order of reversion against confirmed employee passed by the Corporation without giving any opportunity is violative of principle of natural justice and hence also, bad in law. This aspect is considered by the Division Bench in case of Yamini J. Dave [Supra] in para-24, which is quoted as under :

"24. Therefore, after considering the law laid

> down by the Apex Court in respect of the second issue, namely, whether the order of termination is stigmatic or not and regular departmental inquiry is necessary or not and principle of natural justice requires to be observed or not, in our opinion, looking to the decision taken by the Committee on 19th August, 1994, allegations have been made as regards no improvement, casual approach and carelessness and remaining absent, as also made in the C.R. for the year 1994, are bad and unfortunately, same became basis to terminate the service of the appellant. Not only this, the Committee also recommended not to extend the period because of observations made by the Committee were accepted. Therefore, it is clear case of termination based on allegations attache with stigma. Inspite of that, no opportunity was given to the appellant who is deemed to be confirmed and as such, no regular departmental inquiry was held and therefore, in such circumstances, the order of termination is held to be illegal."

##. According to my opinion, the Tribunal has not committed any error in relying upon the Circular dated 3.7.1973, and there is clear finding in support of the conclusion. The Tribunal also has not committed any error in not considering the Resolution of the Standing Committee and the General Board of the Corporation because said material was not referred to and relied upon by the Corporation before the Tribunal. No such submissions were advanced for consideration of the Tribunal. Therefore, the Tribunal has not committed any error in not considering such Resolution passed by the Standing Committee as well as the General Board. This Court has very limited jurisdiction under Article 227 of the Constitution of India. This Court cannot reappreciate the evidence which has been already appreciated by the Tribunal in a considered manner. This Court cannot act as an appellate authority over the decision of the Tribunal and therefore, considering the limited jurisdiction, according to my opinion, Mr.Desai has not been able to point out any basic error committed by the Tribunal which calls for interference by this Court while exercising powers under Article 227 of the Constitution of India.

##. In view of the aforesaid discussion, there is no substance in this petition and the same is therefore dismissed. Interim relief, if any, stands vacated. No order as to costs.

(H.K.RATHOD, J.)

(sunil)